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85-1485

Supreme Court, U.S.
FILED
MAR 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALFREDA WALKER,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Eighth District Court of Appeals
For Cuyahoga County, Ohio

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57pp

QUESTIONS PRESENTED

I

Is due process denied when the reviewing court affirms a homicide conviction because the accused failed to prove she acted in self-defense.

II

Whether the evidence in a conviction was sufficient to satisfy the requirements of due process when it is insufficient to exclude beyond a reasonable doubt the defense contention that the accused acted in self-defense.

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ALFREDA WALKER,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Eighth District Court of Appeals
For Cuyahoga County, Ohio

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The Petitioner, Alfreda Walker, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth District Court of Appeals, which judgment became final on June 6, 1985.

OPINIONS BELOW

The judgment entries by the Supreme Court of Ohio denying further review are set forth at Appendices "A" and "B" in the Appendix to this Petition, at pages A 1 and A 2.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C", at page A 3.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on November 6, 1985. The time for seasonably filing this Petition was extended to and including March 11, 1986. (See Appendix "D", infra, p. A 18.) The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are (1) The Fourteenth Amendment, United States Constitution; (2) Revised Code of Ohio, §§ 2901.05, 2903.02 and 2903.03; and Rule 23 (C), Ohio Rules of Criminal Procedure.

STATEMENT OF THE CASE

The facts in this case, sufficient to at least background the issues herein being raised, can be quoted directly from the Opinion rendered by the State Appellate Court. Here the Court's Opinion states:

> The prosecution established (if it did) appellant, a registered nurse, called the Emergency Medical Squad at 12:30 a.m. on February 9, 1984 to request medical treatment for the victim. When the police arrived the appellant

explained she had stabbed Walter Walker. A police officer testified appellant indicated the victim had pointed a shotgun at her but appellant later maintained "they misunderstood me, I said that he had done it in the past."

* * *

Appellant testified to a fifteen year stormy relationship with the victim. The two were married, divorced and at the time of the incident they were living together in appellant's home. Appellant stated the victim was a good, caring and jolly man when sober but was alcoholic and often drunk. When drunk, he became aggressive, pugnacious and irrational. Throughout the course of their relationship he had repeatedly beaten her and had pointed guns at her on at least two occasions. Other testimony revealed instances where the appellant had committed acts of physical violence against the victim after becoming angered with him.

On the night of the stabbing, appellant arrived home from a church meeting at approximately 11:00 p.m. She was despondent over the recent death of a close friend and concerned about the well being of her son who was stationed overseas with the U.S. Army. She sat at her dining room table holding her head in her hands. The victim approached and questioned why she was sitting in this manner. She replied that it would do no good to explain her feelings to him when he had been drinking.... Angered, the victim began slapping her about the head. After knocking her out of the chair ... the victim allegedly stated, "If you don't talk to me, I am going to get something and make you talk to me."

While the appellant remained on the floor the victim went upstairs and started back down the stairs. The appellant looked up and saw the victim descending the stairs with his right arm down at his side. She thought he was concealing a rifle. She ran into

> the kitchen and grabbed the first available object, viz., a kitchen knife. The appellant swung the knife at the victim who she said lunged at her and the victim then collapsed on the floor.

Appendix "C", infra p. A 5 - A 9.

(Footnotes omitted.)

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

There is one fact in this appeal that really cannot be avoided. Simply put, the trial court gave absolutely no indication as to the basis for his decision rejecting the self-defense evidence and finding the accused guilty of voluntary manslaughter. This being so, it is at once apparent that the Court of Appeals has satisfied itself that justice was done because it was able to search the Record and devine therefrom sufficient post hoc rationalizations, which they artificially imputed to the

trial court, as the basis for his decision.

Clearly the imputation of the various reasons given by them, as to why self-defense was not proven, only tells us the way the Court of Appeals would have decided the issue had it been presented to them with those reasons stated. However, the fact that this is what they would surely have done in such circumstances does not answer for the trial Judge. This follows because one can only speculate as to why the trial judge rejected the self-defense proof.

This case raises the same issues resolved by the Ohio Supreme Court in State v. Martin, 21 Ohio St. 3d 91 (1986), which will surely be cited by counsel opposite in support of its thesis. Martin, of course, is also pending in this Court, or surely will be

before this Petition is reached for consideration.

In Martin the Ohio Supreme Court seems to be telling us that an accused who pleads self-defense actually concedes he acted with an intent to kill "and then relies on independent facts or circumstances which the defendant claims exempt him from liability" (Martin, 21 Ohio St. 3d at 94). This indefensible notion doubtless influenced the Ohio Supreme Court's decision with reference to this petitioner's quest for further appellate review. On this latter point see Ramirez v. Jones, 683 F.2d 712, 716 (2d Cir. 1982) and Malcolm v. Balkcom, 669 F.2d 222, 227 (5th Cir. 1982).

ARGUMENT NO. I

Given The Fact That The Imposition Of The Burden Of Proof On An Accused In A Homicide Case, Who Claims She Acted In Self-Defense, Allows A Conviction Even When The Factfinder Has A Reasonable Doubt On That Issue (i.e., When The Evidence Is In Equipoise On The Self-Defense Issue), Due Process Is Denied When The Reviewing Court Affirms A Homicide Conviction Because The Accused Failed To Prove She Acted In Self-Defense.

The Court of Appeals' conclusion rejecting our self-defense contentions seems clearly to have sorely missed the point. Indeed, certain specifics urged by the Court seem to be out of line with

established tenets.

Here, we first refer to the Court's statement that the "appellant failed to present sufficient evidence of a bona fide belief of imminent danger of death or great bodily harm." Next, the Court makes the absolutely remarkable statement that "she did not establish that her only means of escape was the use of the knife" Appendix "C", infra, p. A 14. And the Court, by literally torturing the petitioner's testimony that she swung the knife at the decedent as he "lunged at her," has reasoned this testimony was inconsistent with her testimony describing one swing of the knife in an act of self-defense (Id., p. A 14).

(A)

First we deal with the Court's conclusion that the defense failed to

establish that the accused had a bona fide belief she was in the appropriate danger (Id., p. A 14). Here, it may suffice to say that the law in Ohio seems clearly to recognize that the test for the presence of such a belief is the subjective one of the defendant. And, it is measured in terms of all the facts and circumstances surrounding the encounter, plus whatever knowledge the accused had concerning her assailant. Simply put, the situation is controlled by her perceptions of the situation not the Court's perceptions.

Since the evidence in this case can only be interpreted as showing Alfreda Walker, the accused, was not the initial aggressor, it follows that the reverse had to be true -- that is, that the accused did in fact reasonably believe she was being attacked or about to be

attacked. Once this point was reached, as it surely had to have been, then the issue here should have turned on whether Alfreda Walker did in fact reasonably believe her resort to the force used was necessary to defend herself.

While the Court's opinion that Mrs. Walker failed to prove she had a bona fide belief as to the existence of imminent danger may yet prove to be a significant finding, the fact that it was predicated on the indefensible notion that this rather small woman was not at any disadvantage in a physical confrontation with her husband (who was 6 feet 3 inches tall and weighed 237 pounds [Id., p. A 16]) is not only startling, it is really unbelievable. This is especially so since the Court fully recognized that the decedent's "blood alcohol content of .17" (Id., p. A 8, n.

3) has never been deemed to be reflective of a stuporous condition. In fact it has only been in recent years that the presumption of intoxication was reduced from 0.15 to 0.10 for the purpose of the charge of DWI. See R.C. of Ohio, §4511.19.

(B)

Also, the Appellate Court's finding that the accused did not prove or otherwise "establish that her only means of escape was the use of the knife" (Id., p. A 14), seems equally flawed. This follows since the law seems clearly to be that there is no duty to retreat when one is in their own home. This is so even when the home involved is also the "dwelling" of the assailant. See, e.g., People v. Tomlins, 213 N.Y. 240, 107 N.E. 496 (1914). Not only this, the law is certainly not so naive as to require one to retreat in a situation

where it could not possibly be known in advance that it could be done with complete safety. Cf., Ervin v. State, 29 Ohio St. 186 (1976).

In this case, the fact that the decedent was obviously bent on venting physical aggression on the petitioner seems really beyond dispute. This is particularly so since she certainly had every reason to believe the decedent had armed himself for that effort (since he left from her presence "to get something to make her talk" to him [Appendix "C", p. A 8]). This being so, even assuming a retreat question existed here, it would turn on whether this lady, to avoid any felonious aggression against her person, was justified in standing her ground in making the effort to repel such an attack. Since we know that "detached reflection cannot be demanded in the

presence of an uplifted knife," Brown v. United States, 256 U.S. 335, 343 (1921), the question then is, should this lady have been required to wait even that long? Stated another way, was she required, in the face of the rapidly unfolding events as she perceived them, to use unerring judgment. We think not.

At the risk of sounding impudent, but the point really must be made regardless of the risk; arguably the Court of Appeals failed to credit the idea that the question in this case (for the trial court and the appellate court) was not whether they believed the force used was necessary in self-defense. Rather, the apt question was whether Alfreda Walker reasonably believed such force was necessary.

It is for the above reasons this Court really ought to consider the issues

raised in this appeal. Also, this Court should further concern itself with the validity of an unstated major premise for the ultimate conclusion reached by the Court of Appeals. Here, we contend that the Court of Appeals simply by exhibiting incredulity regarding the plausibility of the accused's version of the facts cannot, with impunity, impute its personal assessment to the fact-finder (at the trial level) as the basis for their resolution of the credibility issues involved.

ARGUMENT NO. II

A Guilty Verdict Is Against The Manifest Weight Of The Evidence And Is Contrary To Law When The Evidence In A Homicide Case Fails To Exclude Beyond A Reasonable Doubt, The Reasonable Hypothesis That The Accused Acted In Self-Defense.

The evidence to support a homicide conviction should be adequately sufficient to exclude beyond a reasonable doubt the reasonable hypothesis that the accused acted in self-defense. For our part, where as here the only possible predicates for conviction would be circumstantial, the rule must be more rigidly followed than would be the case if there was some direct evidence bearing on the critical issues. See State v. Kulig, 37 Ohio St. 157 (1974) and State

v. Bridgeman, 55 Ohio St. 2d 261 (1978). This follows because in a circumstantial case, such as we have here, guilt is established beyond a reasonable doubt if proved to be more probable than its contradictory.

In this case the argument is being made that under the sufficiency standards applicable here, Jackson v. Virginia, 443 U.S. 307 (1979), petitioner's conviction should be reversed because it is irreconcilable with the reasonable theory of innocence by virtue of self-defense. This is particularly so since petitioner's evidence was the only proof before the Court on the critical issues raised in support of that defense.

It is certainly true that a reviewing court may not substitute it's judgment for that of fact finder's verdict where the requisite proof exists,

State v. Dehass, 10 N.E. 2d 230 (1967) and State v. Hohman, 14 Ohio App. 3d 142 (Clermont County, 1983). In Hohman, cited above, the Court reversed the conviction because the State failed to produce evidence to counter the accused's defense.

At least this much seems clear enough: even the fact-finder's disbelief of a witness' testimony does not create affirmative evidence contrary to that discarded. Stated another way, if an individual's explanation (in this case Alfreda Walker's self-defense testimony) is not believed, it cannot be turned against them on the basis of an easy assumption that it is false.

If the principles referred to above are indeed viable, or merely persuasive, this Court will surely agree then that an examination of this Record not only fails

to disclose support for the trial judge's rejection of the petitioner's self-defense evidence, it actually supports the conclusion that the circumstances of the killing here involved did not qualify Alfreda Walker for the conviction of any criminal offense.

Here, it should again be noted that any evidence of the petitioner's guilt was entirely circumstantial. This, of course, can be all right and surely is the case where the proof of such circumstance is of a conclusive nature and tendency that it leads, on the whole, to a satisfactory conclusion -- that is, one producing a reasonable and moral certainty that the accused is guilty. The upshot of this thesis is that where the proof is entirely circumstantial (the

case here) and there is a reasonable hypothesis which is consistent with the innocence of the accused then this hypothesis must be adopted.

Even though there is no burden on an accused to prove her innocence, we concede that having elected to explain the circumstances, she was bound to tell a reasonable story or be judged by its improbabilities (if such was the case) or any inconsistencies. Also, we concede that in a bench trial, such as was held here, it was within the province of the trial judge to determine credibility and weigh the testimony, to resolve any inconsistencies and conflicts therein, and render his decision accordingly. Also, it seems clearly to be the law that on appeal the Court will not reverse a conclusion unless the evidence is so improbable as to raise a reasonable doubt

of guilt. We contend such is the case here. Cf., Speigner v. Jago, 603 F.2d 1208 (6th Cir. 1979). Also see, State v. Kulig, 37 Ohio St. 157 (1974). Also see State v. Sorgee, 54 Ohio St. 2d 464 (1978).

In this case, the sole defense was that Alfreda Walker had at all times acted in self-defense. As postured by the facts here the critical question was whether, given the quickly unfolding events, her responses were reasonable in the light of her perceptions of the exigencies that existed (see R. 247 to 251). In our view, all the law requires to justify a killing in self-defense is that the person be confronted with such means or force as induces in them a reasonable belief they are in danger of loss of life or receiving great bodily harm.

The considerable evidence demonstrating the decedent's extremely violent behavior toward the accused is uncontroverted. This evidence aptly verifies that the decedent's threats and aggressive conduct were certainly real to our petitioner at the time and place when she stabbed him. This being so, it simply cannot realistically be said her belief that she was in the appropriate danger was unreasonable, fanciful or imagined.

While we concede that one who is threatened by a person who has carried out his threats on previous occasions cannot take the law into his own hands; in deciding whether they acted in self-defense it must be recognized that the law does not require in the face of rapidly unfolding events that one use unerring judgment. In making this

contention, two (2) separate and distinct propositions are being urged. One thesis is that, given the uncontroverted evidence showing the decedent had previously battered our petitioner, his (the decedent's) aggressive conduct and threats were certainly very real to her at this moment of truth. The other thesis turns on the idea that the State failed to prove beyond a reasonable doubt the killing was "unlawful". And for that reason alone her conviction here cannot pass muster when properly gauged.

In all of this we start with a fact that simply cannot be denied -- that is, the right of self-defense arises before the first blood is drawn. This being so, it follows that merely because the Court may have reasoned the decedent was not armed does not establish beyond a reasonable doubt, or by any standard,

that his wife's fear of serious bodily harm and her responses thereto were necessarily unreasonable.

There is still another argument that must figure in the compendium of things relevant to the sufficiency issue. Here we refer to the idea that the fact-finder, based on his reduction of the charge from murder to manslaughter, necessarily must have found that Alfreda Walker was indeed "under extreme emotional stress" that had been "brought on by serious provocation", which was in fact "sufficient to incite her into using deadly force" against the decedent. The language centralized above appears in the charge of Voluntary Manslaughter. (Emphasis supplied.)

The only provocation involved in this case was testified to by Alfreda Walker. It was this provocation that triggered her apprehension that death or

great bodily harm was about to be visited upon her by her husband. Obviously then, with this concession as to the existence of "extreme emotional stress" and "serious provocation", the lack of sufficient evidence from which the Court could find guilt beyond a reasonable doubt becomes most conspicuous. So much so, that any conclusion that substantial evidence sufficient to support the guilty verdict in this case is present would be unreasonable to a fault.

Even this is not all. Since the issue as to whether she acted in self-defense was perforce resolved against her by the Court, under the facts here there is only one possible theory on which the Court could have convicted her. Again, the facts show (and there was no contention to the contrary) that Alfreda Walker subjectively believed the force

used by her was necessary. Yet, she was nonetheless convicted. This being so, it has to be that the Court concluded her belief such force was needed was unreasonable. This follows because if her belief was reasonable, then she should have been acquitted on the grounds of self-defense.

So postured, the required conclusion here has to be that the evidence failed to support a finding that Alfreda Walker's use of deadly force was unlawful. Hence, she should have been deemed not guilty by the Court.

In making the argument above, it is of course being fully conceded that in a criminal bench trial, the situation here, it is for the trial Judge to hear the testimony and determine the credibility of the witnesses. Since the trial court in such situations (as fact finder) has

the opportunity to observe the witnesses, a reviewing court is not obliged, or obligated, to reverse or disturb his findings, (including a finding of guilt) unless the proof is so unsatisfactory or implausible as to justify a reasonable doubt as to the guilt of the accused.

In this case, of course, the trial court typically did not articulate the basis for his rejection of the self-defense plea. Nor did he explain his rejection of the murder charge in favor of manslaughter. Thus the Court of Appeals considered this case without even the slightest hint as to the trial court's thought process. Surely then, the petitioner's self-defense thesis ought not be rejected with impunity on the basis of such shallow reasoning.

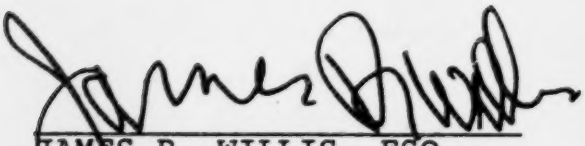
CONCLUSION

In this case we contend that the imputation of an obligation to retreat to the petitioner under the facts of this case, by the Court of Appeals, seriously flaws its Opinion affirming this conviction. Simply put, even if a duty to retreat exists in a particular situation, one can stand their ground and use deadly force otherwise appropriate if the alternative were perilous, or if to her/him it would reasonably appear to be.

What also significantly bears on this point is the fact that all the evidence on this issue was in favor of the petitioner. Indeed the evidence is uncontradicted that the decedent was the aggressor. He initiated, generated and fueled the confrontation. The facts show he left the room where the petitioner was with the threat that he would get

something to make her talk to him. Clearly these statements by the decedent, when coupled with his abrupt return, were acts the petitioner could reasonably deem were calculated to produce a foreboding of fatal consequences for her such as would justify the effort to defend against with appropriate force.

Respectfully submitted,



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Cleveland, Ohio 44114
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ of Certiorari was sent by certified mail, return receipt requested, to the office of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this 28th day of February, 1986.

James R. Willis

JAMES R. WILLIS, ESQ.
Attorney for Petitioner

APPENDIX

The Supreme Court of Ohio

Columbus

1985 TERM

To wit: November 6, 1985

State of Ohio, Appellee,	:	Case No. 85-1259
v.	:	E N T R Y
Alfreda Walker, Appellant.	:	

Upon consideration of the motion for leave to appeal from the Court of Appeals for Cuyahoga County, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20.00, paid by J. R. Willis.

FOR YOUR INFORMATION ONLY NOT FOR FILING

Frank D. Celebrezze

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY CLERK

_____ DEPUTY

APPENDIX "A"

The Supreme Court of Ohio

Columbus

1985 TERM

To wit: December 11, 1985

State of Ohio, Appellee,	:	Case No. 85-1259
v.	:	REHEARING ENTRY
Alfreda Walker, Appellant.	:	(Cuyahoga County)

It is ordered by the Court that rehearing in this case be and the same is hereby, denied.

FOR YOUR INFORMATION ONLY NOT FOR FILING

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 11th day of December, 1985.

JAMES WM. KELLY CLERK

DEPUTY

APPENDIX "B"

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 49118

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	
	:	
-vs-	:	JOURNAL ENTRY
	:	and
ALFREDA WALKER	:	OPINION
	:	
Defendant-Appellant	:	

DATE OF ANNOUNCEMENT OF DECISION: JUNE 6, 1985

CHARACTER OF PROCEEDING: Appeal from Cuyahoga County Court of Common Pleas, Criminal Division, No. 188949

JUDGMENT: Affirmed

DATE OF JOURNALIZATION:

APPEARANCES:

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- APPENDIX "C" -

KRUPANSKY, J.:

On February 8, 1984 Alfreda Walker (appellant) stabbed her common law husband, Walter Walker, in the left chest with a kitchen knife. The blade penetrated eight inches into the victim's chest piercing his heart and entering his lung. There were no witnesses to this fatal stabbing.

On March 12, 1984 the appellant was indicted for the murder of Walter Walker in violation of R.C. 2903.02. [1] The appellant waived her right to a trial by jury and trial commenced on June 11, 1984 before a judge. On June 13, 1984 the court found appellant guilty of the

---

1 R.C. 2903.02 provides:

(A) No person shall purposely cause the death of another.

(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

lesser included offense of voluntary manslaughter. [2]

The prosecution established appellant, a registered nurse, called the Emergency Medical Squad at 12:30 a.m. on February 9, 1984 to request medical treatment for the victim. When the police arrived the appellant explained she had stabbed Walter Walker. A police officer testified appellant indicated the victim had pointed a shotgun at her but appellant later maintained "they misunderstood me, I said that he had done

---

2 R.C. 2903.03 provides:

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

it in the past." A .22 caliber rifle was found in an upstairs bedroom under a bed. No shotgun was discovered until approximately one month later when the appellant's son reported he found a shotgun under a couch in appellant's home. A police officer testified to having observed the area where the shotgun was later uncovered but his inspection failed to reveal any weapon on February 9, 1984.

Appellant testified to a fifteen year stormy relationship with the victim. The two were married, divorced and at the time of the incident they were living together in appellant's home. Appellant stated the victim was a good, caring and jolly man when sober but was alcoholic and often drunk. When drunk, he became aggressive, pugnacious and irrational. Throughout the course of their

relationship he had repeatedly beaten her and had pointed guns at her on at least two occasions. Other testimony revealed instances where the appellant had committed acts of physical violence against the victim after becoming angered with him.

On the night of the stabbing, appellant arrived home from a church meeting at approximately 11:00 p.m. She was despondent over the recent death of a close friend and concerned about the well being of her son who was stationed overseas with the U.S. Army. She sat at her dining room table holding her head in her hands. The victim approached and questioned why she was sitting in this manner. She replied that it would do no

good to explain her feelings to him when he had been drinking. [3]

Angered, the victim began slapping her about the head. After knocking her out of the chair [4] the victim allegedly stated, "If you don't talk to me, I am going to get something and make you talk to me."

While the appellant remained on the floor the victim went upstairs and started back down the stairs. The appellant looked up and saw the victim descending the stairs with his right arm down at his side. She thought he was concealing a rifle. She ran into the kitchen and grabbed the first available

---

3 The autopsy revealed a blood alcohol content of .17. Expert testimony established this level is a stage at which the individual is appreciably under the influence of alcohol.

4 Only one police officer could remember seeing a dining room chair overturned.

object, viz., a kitchen knife. The appellant swung the knife at the victim who she said lunged at her and the victim then collapsed on the floor.

For its part, the prosecution established there was no shotgun found at the scene. The area where the shotgun was eventually found on April 5, 1984, approximately two months later, was behind the couch approximately 13 feet from where the victim fell; there was no blood between the two areas. The investigating officers testified the house did not show evidence of a struggle. There was medical evidence of two superficial cuts on the victim's left cheek and right hand. Finally, there was evidence describing the appellant's history of violence toward the victim.

Appellant assigns two errors: the first assignment is as follows:

THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT SUMMARILY FOUND THE DEFENDANT GUILTY WITHOUT ARTICULATING ANY OF HIS ESSENTIAL FINDINGS ON THE RECORD.

This assignment is without merit.

Crim. R. 23 (C) states in full:

> "In a case tried without a jury the court shall make a general finding."

The record reveals the case sub judice was tried without a jury because appellant made a knowing, intelligent and voluntary waiver of her right to a jury trial. The general verdict rendered by the trial court was in keeping with the express directive of Crim. Rule 23 (C).

Appellant contends in her brief Fed. R. Crim. P. 23(C) requires specific findings by the trial court judge. Fed. R. Crim. P. 23(C) states as follows:

> In a case tried without a jury the court shall make a general finding and shall in addition on request find the facts specifically. If an opinion or memorandum of decision is

> filed, it will be sufficient if the findings of fact appear therein. (Emphasis added)

Thus, Fed. R. Crim. P. 23(C) requires specific findings only when requested. In the case sub judice appellant made no such request nor is there any provision for such request in our rules. The Ohio Criminal Rules are patterned after the Federal Rules of Criminal Procedure. When drafting the Ohio Rules the draftsmen, no doubt, considered the Federal Rules. Therefore, the specific omission of the request for special findings must be considered intentional.

Although not assigned as error, appellant suggests a violation of due process in her brief but offers no reason for her assertion specific findings are an essential element of due process. In light of both the Ohio and Federal rule this court holds specific findings by the

trial court were not required in the case sub judice. The general finding of the trial court was not violative of due process.

Appellants' second assignment of error is as follows:

> THE GUILTY VERDICT HERE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS CONTRARY TO LAW.

When faced with an allegation of insufficient evidence to support a guilty verdict a reviewing court must examine the record at trial to determine whether the evidence presented, "which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt" State v. Walker (1978), 55 Ohio St. 2d 208; Atkins v. State (1926), 115 Ohio St. 542. Such an examination involves the weighing of the evidence developed at trial. State v. Kulig (1979), 37 Ohio St. 2d 157.

Appellant contends the evidence supports a finding of self-defense and not voluntary manslaughter. The syllabus of State v. Robbins (1979), 58 Ohio St. 2d 74 states:

> To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger. (State v. Melchior, 56 Ohio St. 2d 15, approved and followed.)

In support of her theory of self-defense appellant testified on direct examination she saw the victim approach her with "something immediate under his arms" (Tr. 249). Later, on cross-examination the appellant stated she could not recall seeing any weapon on the night of the stabbing (Tr. 287). Appellant failed to

present sufficient evidence of a bona fide belief of imminent danger of death or great bodily harm. Nor did she establish that her only means of escape was the use of the knife.

Moreover, the physical evidence on the victim's body did not comport with the testimony offered by appellant. Appellant stated she "swung" the knife at the victim as he "lunged at her". The victim had two superficial cuts as well as the gaping wound in the chest. Such superficial wounds are not consistent with the testimony describing one swing of the knife in an act of self-defense.

The prosecution offered testimony of two important prior incidents. In 1975 the appellant shot the victim with a .22 caliber handgun. (Tr. 291). The appellant admitted to this shooting but claimed to have aided in transporting the

victim to the hospital. The victim's niece, an eyewitness to the shooting, testified the appellant shot the victim as the two stood talking. After firing the shot the appellant said, "don't come home [a]nd got in her car and drove away". (Tr. 300). In 1982 the appellant assaulted the victim after he became verbally abusive at a family gathering. A witness testified the appellant knocked the victim's glasses off and his false teeth out as she delivered several blows. (Tr. 104).

R.C. 2903.03(A) sets forth the elements of voluntary manslaughter:

> No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.

In the case sub judice the evidence showed the appellant and victim to have been involved in a turbulent relationship punctuated by acts of violence against each another. These acts were reciprocal and both combatants were capalbe of disabling the other. In spite of the victim's physique, viz., 6'3", 237 lbs., the appellant was not at a disadvantage when the victim was in an inebriated condition. The court below considered appellant's version of the events on the evening in question and weighed that against the other testimony and physical evidence presented at trial. As the trier of fact the trial court judge determined the credibility of the witnesses and the weight to be given the evidence State v. DeHass (1967), 10 Ohio St. 2d 230. The trial record discloses a substantial amount of evidence

establishing the elements of voluntary manslaughter beyond a reasonable doubt. This court cannot disturb the verdict. State v. Eley (1978), 56 Ohio St. 2d 169.

Judgment affirmed.

* * *

NAHRA, P.J. and

PRYATEL, J., CONCUR

JUDGE
BLANCHE KRUPANSKY

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C. 20543

January 29, 1986

James R. Willis, Esquire
Suite 610, Bond Court Building
1300 East Ninth Street
Cleveland, OH 44114

Re: Alfreda Walker v. Ohio,
A-572

Dear Mr. Willis:

Your application for an extension of time in which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on January 29, 1986, signed an order extending your time to and including March 11, 1986.

A copy of the Justice's order is enclosed.

Very truly yours,

JOSEPH F. SPANIOL, JR., Clerk

By

Edward L. Turner, Jr.
Assistant Clerk

VR
Enc.

cc(letter only): John T. Corrigan, Esq.

Supreme Court of the United States

No. A-572

ALFREDA WALKER,

Applicant,

v.

OHIO

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 11, 19 86

/s/ Sandra D. O'Connor

[redacted]

Dated this 29th day of January, 19 86